

C.A230-235/2013

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC  
OF SRI LANKA**

In the matter of an appeal against the  
Order of the High Court under section  
331 of the Code of Criminal Procedure  
Act No. 15 of 1979 as amended.

1. Mohamed Faizer Mohamed Liyakath
2. Mohamed Manzoor Mohamed Ramaz
3. Mohamad Manzoor Mohamed Harariz
4. Mohamed Manzoor Mohamed Rizwan
5. Mohama Sali Mohamad Mohamad  
Manzoor (deceased)
6. Mohamed Sali Mohamed Nizar  
Hussain
7. Mohamad Manzoor Mohamaf Irfan

**Accused-Appellants**

**C.A. Case No:- 230-235/2013**

**H.C. Kalutara Case No:- 874/2007**

**V.**

**The Hon. Attorney General**

Attorney General's Department,  
Colombo.12.

**Respondent**

**Before:- H.N.J.Perera, J. &**

**K.K.Wickremasinghe, J.**

**Counsel:-**Shanaka Ranasinghe P.C for the 1<sup>st</sup> and the 6<sup>th</sup> Accused-  
Appellants

Razik Zarook P.C with Rehana Deshapriya,Amila Palliyage  
For the 2<sup>nd</sup>,3<sup>rd</sup> and 4<sup>th</sup> Accused-Appellants

Wasantha Navaratne Bandara A.S.G for the Respondent

**Argued On:-**14.05.2015

**Written Submissions:-**31.08.2015

**Decided On:-**29.09.2015

**H.N.J.Perera, J.**

The accused-appellants were indicted in the High Court of Kalutara on five counts punishable under section 140,146,296 and 300 of the Penal Code. At the conclusion of the trial all accused were found guilty of all counts of the indictment (except the deceased 5<sup>th</sup> accused ) and as sentenced to 18 years R.I on the attempted murder count, and sentenced to death on the count of murder. Being aggrieved by the aforesaid conviction and sentence of the High Court the accused-appellants have preferred this appeal to this court.

When this matter was taken up for argument before this court the Counsel for the 1<sup>st</sup> and the 6<sup>th</sup> accused-appellants took up a preliminary objection stating that the said accused-appellants were not given the

option of a Jury and hence in view of the judgment(2008) B.L.R 145 Attorney General V. Aponso , whole proceedings are illegal.

Sec 195 (e)(e) reads thus:-

“If the indictment relates to an offence triable by Jury, inquire from the accused whether or not he elects to be tried by a Jury”

The accused-appellants in this case are indicted for committing an offence punishable under section 296 of the Penal Code. Therefore a duty is cast on the court to inquire from the accused whether they elects to be tried by a jury or not. As held by his Lordship as the situation in the instant case is rather different from the situation that was prevailed Asoka De Silva, C.J in Attorney General V. Viraj Aponso ‘non observance of this procedure is an illegality and not a mere irregularity.’

Nevertheless the situation in the instant case is rather different from that of the case of AG V. Viraj Aponso. In the instant case I do not perceive any serious defect as observed by his Lordship, because what is of paramount of importance is the offer of Jury option which right had been afforded to the accused-appellants at the very initial stage of the case.

It is pertinent to peruse the proceedings and arrive at a conclusion as to whether in fact the accused-appellants were granted the Jury option or not. A careful perusal of the proceedings will show that Jury option had in fact been granted to the accused-appellants in this case.

It would be pertinent to refer to the proceedings of 29.08.2007 recorded at page 96 of the brief. It is recorded on 29<sup>th</sup> of August that all the accused were present in court and was represented by a Counsel. The material part of the brief reads as follows:-

Accused 1 to 7 present.

Priya Manawadu Attorney-at-Law appears for them.

Dishna Warnakula S.S.C. appears for the complainant.

Indictments and attached documents are handed over to the accused in open court.

Take finger prints of the accused.

### **Non-Jury trial asked for ( or requested )**

Therefore trial is fixed before the High Court Judge.

The word that is stated in Sinhala Language. Is “Illai” or ‘asked for’

This clearly indicates that there has been an application made by the accused for a non-jury trial and consequent to that the case had been fixed for trial before the High Court Judge without a Jury. It is very clear from the proceedings that the said request had been made when all the seven accused were present in court. They were also represented by a Counsel.

The court has to be guided by the case record and whatever the entries found in the Record cannot be lightly disregarded. The record is the sole guide to what actually transpired in court and the Record cannot be impeached or supplemented. A careful perusal of the proceedings show that Jury option had in fact been granted to the accused-appellants.

The option of the accused, to be tried without a Jury, had been conveyed to court and the court had duly recorded this option, and thereafter trial before the High Court Judge had been fixed.

From the journal entry it is very clear that the accused had elected to have a non-Jury trial and that fact had been conveyed to the learned trial Judge. The proceedings of 29.08.2007 indicates without doubt that either the court had inquired from the accused whether they wish to have a Jury trial and the accused had asked or requested for a Non-Jury

trial and or that the accused themselves had made an application or requested for a non-Jury trial from court and the court had accordingly fixed the case for trial and or the accused on their own had asked or requested from the court to fix the trial before a High Court Judge. In either case it is clear that the said Jury option had been given to the accused in this case. The Criminal Procedure Code, does not provide a particular compulsory format that has to be read out when explaining the jury option to the accused. In the absence of such a format the manner of how the Jury option should be explained or recorded, is left to the discretion of the High Court Judge. If the record reflect anywhere that the Jury option had been given to the accused in satisfactory form, such reflection is sufficient for the purposes set out in Attorney General V. Aponso case.

In Attorney General V. Aponso the state had conceded the fact, that the relevant court records did not reflect anywhere that the Jury option had been given to the accused. In the instant case as indicated above, the Jury option had been clearly given to the accused.

In view of the above reasons I overrule the preliminary objection and fix this case for argument.

Preliminary objection overruled.

**JUDGE OF THE COURT OF APPEAL**

**K.K.Wickremasinghe, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**